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Physician-Patient Privilege

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PHYSICIAN-PATIENT PRIVILEGE

The privilege granted to the physician-patient relationship is found in Chapter 51, section 5.1.¹ There was no physician-patient privilege at common law and prior to this statute's enactment in 1959 no privilege existed in Illinois.² Illinois was one of the later states to give some protection to communications between a physician and patient. The statutory protection given to this relationship in other states was often criticized.³ In some circumstances, it appeared the intended benefits of the physician-patient privilege were outweighed by the resulting hardship and abuses it caused. But unlike most other states whose statutes, at least before many were amended, are an unqualified grant of privilege, the Illinois statute has many exceptions. This is apparently an attempt to give some protection to the physician-patient relationship, but at the same time exclude protection where injustice or unnecessary hardship is likely to occur.

The purpose of the statute is to promote the patient's disclosure of intimate facts necessary for correct treatment by a physician which may be withheld if a patient fears future publication.⁴ A policy determination has been made that disclosure for treatment is more important than the ascertainment of the truth in the course of litigation. The statute gives the patient the opportunity to disclose intimate facts necessary for treatment

¹ No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure related directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in the case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition, (4) in all civil suits brought by or against the patient, his personal representative, a beneficiary under a policy of insurance or the executor or administrator of his estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as will of the patient, (6) in any criminal action where the charge is either murder by abortion, attempted abortion. . . . In the event of a conflict between the application of subsection (1), (2), (4), (5) or (6) of this Section and Section 5.2 to a specific situation, the provisions of Section 5.2 shall control. Ill. Rev. Stat. ch. 51, § 5.1 (1967).

² Cronin v. Court of Honor, 187 Ill. App. 480 (1st Dist. 1914); Gill v. Modern Woodmen of America, 221 Ill. App. 388 (4th Dist. 1920); 37 I.L.P. Witnesses § 61 n.6; Gard, Illinois Evidence Manual Rule 441 (1963); Oblinger, *Privileged Communications Between Physician and Patient in Illinois*, 37 Chi-Kent L. Rev. 97 (1960).

³ See Leusink v. O'Donnell, 255 Wis. 627, 39 N.W.2d 675 (1949); 8 Wigmore, Evidence § 2380a (McNaughton rev. 1961); *Physician-Patient Privilege: A Need to Revise the Arizona Law*, 6 Ariz. L. Rev. 292 (1965); *Legislation Notes, Privileged Communications-Abrogation of the Physician-Patient Privilege to Protect the Battered Child*, 15 De Paul L. Rev. 453 (1966); *A Critical Examination of Some Evidentiary Privileges: A Symposium*, 56 Nw. U.L. Rev. 206 (1961); *Ohio's Physician-Patient Privilege in Personal Injury Cases-Time for Reform*, 16 W. Res. L. Rev. 334 (1965).

⁴ Stayner v. Nye, 227 Ind. 231, 85 N.E.2d 496 (1948); Brackney v. Fogle, 156 Ind. 535, 60 N.E. 303 (1901); Leusink v. O'Donnell, *supra* note 3; 8 Wigmore, Evidence § 2380 (McNaughton rev. 1961).

without having to sacrifice his privacy. If the purpose of the statute is to protect the patient's health and privacy, it follows that a patient can waive his privilege.⁵ This appears to be the position taken by the Illinois legislation, which provides that a patient may waive the protection of the statute.⁶ But in addition, the courts have held that a patient can not claim the benefit of the statute when his conduct is inconsistent with a claim of privacy.

The physician-patient privilege is subject to abuse when the patient is instituting the litigation. The patient is able to waive his privilege if the testimony of a physician is favorable and then claim privacy to exclude the unfavorable testimony of other physicians. This abuse has been prevented in other jurisdictions by finding that a patient has completely waived his privilege to the subject matter he voluntarily discloses.⁷ The subject matter which the patient disclosed by allowing testimony by any doctor is no longer privileged and all doctors who have treated the patient for the same condition can be made to testify. The courts have reasoned

⁵ In *Cronin v. Court of Honor*, *supra* note 2, the court said, in dictum, that the privilege is for the patient, and where he has waived it the physician may not claim the privilege. The court said in *Penn. Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 100 (1885):

... Notwithstanding the absolutely prohibiting form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive. It gives no right to the physician to refuse to testify. ...

Accord, *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1948). *See* *Angerstein v. Milwaukee Monument Co.*, 169 Wis. 502, 173 N.W. 215 (1919); 8 Wigmore, Evidence § 2386 (McNaughton rev. 1961).

⁶ Except where the privilege does not apply by statutory exception, the statute reads, "No physician or surgeon *shall be permitted* (emphasis added) to disclose any information . . . except . . . (3) with the express consent of the patient [or his personal representative]. . . ." Ill. Rev. Stat. ch. 51, § 5.1 (1967). Compare the wording in other provisions:

"In civil and criminal cases . . . a patient or his authorized representative and a psychiatrist or his authorized representative have *the privilege to refuse to disclose* (emphasis added). . . ." Ill. Rev. Stat. ch. 51, § 5.2 (1967). Does this mean that a psychiatrist can waive the privilege to refuse without the patient's consent or even at the patient's objection? Ill. Rev. Stat. ch. 91½, § 406 provides "No psychologist shall disclose any information he may have acquired . . . except only . . . (4) with the expressed consent of the client. . . . This wording indicates the privilege is for the benefit of the patient only.

⁷ This problem is illustrated by the following case of *Schlarb v. Henderson*, 211 Ind. 1, 4 N.E.2d 205 (1936). There was a question of establishing injuries sustained in an auto accident. After the accident, the plaintiff was operated on for an appendix operation and certain tissue was also removed for examination. Testimony was introduced that the appendix was not chronically involved with the injury caused by the accident.

Three doctors made microscopic examinations, and the plaintiff sought to exclude the evidence of one doctor who thought the injury was the result of the patient's appendix. The court held the plaintiff had waived his privilege by a voluntary disclosure of the findings of the two physicians. The patient may not choose his version of the injury with a claim of privacy to exclude testimony of an adverse witness. *Accord* *State v. Sapp*, 356 Mo. 705, 203 S.W.2d 425 (1947). In *Steinberg v. New York Life Ins. Co.*, 263 N.Y. 45, 188 N.E. 152 (1933), the patient was not allowed to exclude the testimony of the doctor who treated him three years earlier for the same condition. *See* *Cretney v. Woodman Accident Co.*, 196 Wis. 29, 219 N.W. 448 (1928); 8 Wigmore, Evidence § 2390 nn.3 & 4 (McNaughton rev. 1961); Annot., 5 A.L.R.3d 1244 §§ 3 & 4 (1966).

that there is no longer any reason to protect the privacy of the patient by preventing the publication of information acquired by a doctor if the patient has already allowed publication on the same condition. It appears that Illinois will allow all physicians who examined the patient for the same condition to testify if the patient calls any of the physicians to testify.⁸

The patient is prevented from giving selected testimony, but this still places the opposition at a serious disadvantage for two reasons. First, the patient may not require medical testimony of prior treatment to sustain his claim or defense.⁹ If there is no testimony of prior medical treatment, the opposition will not be able to say the patient has waived his privilege. Second, the patient may find it necessary to allow testimony concerning prior medical treatment, but the patient does not waive his privilege until trial. In the interim, the patient may claim the privilege during pre-trial discovery to prevent the opposition from preparing its case properly or to induce the opposition to make a favorable settlement.¹⁰ The patient is in the enviable position of being able to derive a benefit from a privilege he may waive at the trial.

The Illinois statute apparently places the patient and his opponent on a more equal footing. The Illinois statute provides that a physician shall not disclose any information *except* in civil suits brought *by or against*¹¹ the patient, his personal representative, a beneficiary under a policy of

⁸ In *People v. Givans*, 83 Ill. App. 2d 423, 429, 228 N.E.2d 123, 126 (1st Dist. 1967), the defendant raised the defense of insanity. The defendant sought to exclude the testimony of one psychiatrist as a privileged communication. The court said,

. . . . By calling his own doctor to the stand, defendant waived his right to assert the privilege. . . . (H)e "could not be permitted to call as witnesses only those doctors whom he desired to call, and then claim the right to object as to other doctors who treated and examined him for the same condition."

There is no apparent reason why the same reasoning should not apply to the physician-patient privilege. See Gard, Illinois Evidence Manual Rule 441 (1963).

⁹ The patient does not destroy his privilege by calling physicians as expert witnesses or testifying to his physical condition generally. Only when the patient must testify to treatment he received or when he must call a physician who has treated him is the privilege destroyed. In *McLaughlin v. Massachusetts Indem. Ins. Co.*, 85 Ohio App. 511, 84 N.E.2d 114 (1948), the insurance company claimed the patient had waived his privilege attaching to Army service records by testifying to the diagnosis of his physical condition when discharged from the Army. The court found the patient would not waive his privilege unless he was testifying from information derived from his medical reports. The court found he was testifying from information he had seen elsewhere. See 8 Wigmore, Evidence §§ 2389 & 2390 (McNaughton rev. 1961); 97 C.J.S. Witnesses § 310 (1957).

¹⁰ *Padovani v. Liggett & Myers Tobacco Co.*, 23 F.R.D. 255 (E.D.N.Y. 1959) (plaintiffs bringing the action does not waive the privilege and the privilege applies during pre-trial discovery); *Ohio's Physician-Patient Privilege in Personal Injury Cases—Time for Reform*, 16 W. Res. L. Rev. 334 (1965).

¹¹ Whenever an insurance company seeks to recover funds which it feels may have been paid on the basis of erroneous medical reports or other information, it must necessarily bring the action *against* the patient. *Prudential Ins. Co. v. Heaton*, 20 O.L.Abs. 454 (1935) (action by an insurance company to cancel a life insurance policy on the ground of fraud in the application; the medical history of the patient was privileged); 41 N.C.L. Rev. 627 (1963).

insurance, or an executor or administrator where the patient's physical or mental condition is an issue. By comparison, section 5.2, which confers a privilege on psychiatrist-patient communications, requires that the patient introduce his mental condition as an element of *his claim or defense*. The legislature intended a different treatment for each relationship. Section 5.1 provides that in case there is a conflict between the protection offered in sections 5.1 and 5.2, 5.2 should prevail. One Illinois court has indicated that either party may place the patient's physical or mental condition in issue, thereby compelling the *physician* to testify at trial. The same court held that only the patient could put his mental condition in issue and thereby allow a *psychiatrist* to testify.¹²

¹² It would appear by the wording used in the Illinois statute granting the physician-patient privilege that the patient's physical or mental condition can be raised by either the plaintiff or defendant. The physician is able to testify in civil suits where the patient's physical or mental condition is an issue. The statute does not say who must put the condition at issue. See subsection 4 *supra* note 1, for statutory wording. Compare this with the companion statute, Ill. Rev. Stat. ch. 51, § 5.2 (1967), which relates to the psychiatrist-patient relationship. The relevant portion of the statute says, "There is no privilege under this section for any relevant communications . . . (c) in a civil or administrative proceeding in which the patient introduced his mental condition as an element of his claim or defense. . . ."

In *Webb v. Quincy City Lines, Inc.*, 73 Ill. App. 2d 405, 219 N.E.2d 165 (4th Dist. 1966), the plaintiff got her arm caught in the bus door. Her physician suggested that she see a psychiatrist because of her reaction to the accident. The offer of proof showed she may have imagined part of her mental anguish. The defendant sought to have the psychiatrist testify to show that part of her alleged mental anguish was imaginary. The defendant argued that a claim for pain and suffering put her mental condition at issue. The court found that a claim for pain and suffering was not sufficient to put the patient's mental condition at issue. It is assumed that the defendant then argued that if she did not put her mental condition at issue, the defendant had done so by claiming that her mental condition was relevant to her claim for pain and suffering. The court answered by saying:

. . . . We would further note that the legislature differentiates between the general physician-patient statute, Ill. Rev. Stats. 1965, c 51, § 5.1, and the psychiatrist-patient statute, by providing that in any conflict between the two, the provisions of § 5.2 shall control. We think we are under compulsion, therefore, to read § 5.2 literally and to hold that the privilege exists unless "mental condition" is specifically made a part of either the claim or defense [of the patient]. It was not so placed in issue here. 73 Ill. App. 2d at 408.

It appears Illinois has adopted the minority, but rapidly increasing view, that a patient waives his privilege by bringing a suit. The theory is the patient has disclosed his ailment and the repugnancy of disclosure no longer exists. The Illinois statute would indicate that there is a waiver beyond the issues which the patient discloses. See Gard, Illinois Evidence Manual Rules 441 & 441A.

The following cases exemplify the view that the physician-patient privilege is waived to some extent by instituting a suit. *Burlage v. Haudenschild*, 42 F.R.D. 397 (N.D. Iowa 1967) (waiver of privilege during pre-trial discovery if disclosure of privileged information at trial is reasonably probable). In the case of *City and County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P. 226 (1951), Judge Traynor said a patient waives the physician-patient privilege by bringing a suit for his personal injuries. This case was followed in *San Francisco Unified School Dist. v. Superior Court*, 55 Cal. 2d 451, 393 P.2d 925 (1961). A physician may be compelled to turn over medical records for discovery and submit to the taking of depositions. See *State v. Swinburne*, 324 S.W.2d 746 (Mo. 1959); *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. 1968). (this case changes Missouri law in civil cases. A patient may not claim the privilege during discovery if the physician-patient privilege must be waived at trial to prove injuries); *City of Portsmouth v. Cilumbrello*, 204 Va.

What is not clear from the statute itself is at what stage the defendant can put the patient's physical or mental condition in issue. It would seem that disclosure should be allowed during pre-trial discovery; the rules for discovery seem to support this view.¹³

It appears that under the exceptions to section 5.1 a patient would waive his privilege by instituting a suit where his physical or mental condition is an issue. Having waived his privilege, it is still necessary to determine the extent to which the privilege is waived by litigation. In the usual situation, the defendant is trying to obtain medical information concerning treatment for a condition he has allegedly caused. Sometimes prior medical history is either useful or necessary to show the plaintiff's claim is for pre-existing injuries. In the latter situation the court must decide if the physician may be asked to testify, or his records subpoenaed, in regard to prior treatment where the treatment was not for the mental or physical condition in litigation. The few courts which have considered this question have generally answered in the negative.¹⁴ However, in Illinois it would appear the patient's entire history is subject to disclosure regardless of when and for what reason the patient sought professional assistance.¹⁵

It appears that only a relationship between the suit and a prior physical or mental condition must exist. A relationship has been found when an accident allegedly revived an old neurosis or when an accident supposedly caused an impairment to the plaintiff's left arm and leg which was already disabled by a sclerosis condition.¹⁶ But the guidelines for the

11, 129 S.E.2d 31 (1963). (entire privilege waived by bringing action); Annot., 21 A.L.R.3d 912 §§ 3, 6 & 8 (1968).

¹³ Ill. Rev. Stat. ch. 110A, § 201 (b) 2 (1967) provides that "All matters that are privileged against disclosure at the trial . . . are privileged against disclosure through any discovery procedure." If information would not be privileged at trial then there should be no protection during pre-trial discovery.

¹⁴ The authority on this point agrees a waiver of the privilege for the physical or mental condition at issue is generally not a waiver for past unrelated or unconnected injuries. Most of the cases on this topic are discussed in 5 A.L.R.3d 1244 § 4 (1966). See 8 Wigmore, Evidence § 2389 n.1 (McNaughton rev. 1961).

¹⁵ In *Rylko v. Katz*, 84 Ill. App. 2d 93, 228 N.E.2d 135 (1st Dist. 1967) an old neurosis was allegedly revived by an automobile accident. Some evidence was given concerning wounds and neurosis suffered in the Second World War. The court held that the defendant had the right to put the plaintiff's Army medical records in evidence. But this was only an abstract decision and the reasoning of the court is not given. If Illinois adopts the view that the physician-patient privilege is waived by bringing a suit, there is no reason, other than policy, why all evidence should not be disclosed which relates to the issues of the case. See *State ex rel. McNutt v. Keet*, *supra* note 12 (all relevant past history is available for discovery).

In *Rylko*, it perhaps could have been argued that the patient waived his privilege by his testimony of prior treatment. However, there is no showing to what extent the patient testified to the prior injuries. Usually more than just a reference to general treatment is necessary to waive the privilege by the patient's testimony. See note 9 *supra*; 8 Wigmore, Evidence § 2389 n.7 (McNaughton rev. 1961); Annot., 114 A.L.R. 798 (1938); Annot., 98 A.L.R. 1284 (1935).

¹⁶ *Rylko v. Katz* *supra* note 15; *Leusink v. O'Donnell*, 255 Wis. 627, 39 N.W.2d 675 (1949).

relationship that must exist are described in such general terms as requiring only a prior disability which affects the same part of the person.¹⁷

With this general standard, it will be necessary for the courts to supervise the questioning of physicians and the examination of medical records. This is especially true during pre-trial discovery when the procedural safeguards of the courtroom are not available. An unsupervised rummaging through prior medical history would allow matters which have a certain extortion value to be discovered. A person may not wish to bring a legitimate suit if he feels unrelated but intimate and embarrassing information will be opened to public scrutiny. A husband may not bring a suit and risk having his wife discover that he was treated for a social disease before their marriage.¹⁸

Many courts struggled with the question of who could waive the privilege if the patient was either dead or incompetent. In actions to set aside deeds made by infirm persons, or when the validity of a will is put in question, often the only person available to testify on the issue of competency or sanity is the attending physician.¹⁹ At the present time, either by decision or statute, the physician-patient privilege has been made a personal right which passes to the personal representative.²⁰ This view recognizes that the personal representative has an interest in preserving the good name of the deceased and will not allow the disclosure of information which would blemish the deceased's name.²¹ However, this view also assumes the personal representative will act honestly and in good faith. Such confidence is not always warranted. In actions involving the validity of a will or deed, the person being sued is frequently the personal representative and he can prevent medical testimony which is unfavorable to his interest. By claiming the physician-patient privilege, the personal representative can successfully conceal that a deed or will, beneficial to his interest, was either made by someone mentally incompetent or procured

¹⁷ *Leusink v. O'Donnell*, *supra* note 16.

¹⁸ *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. 1968); *Oblinger, Privileged Communications Between Physician and Patient in Illinois*, 37 Chi-Kent L. Rev. 97 (1960).

There is statutory authority for the courts to supervise discovery procedures to prevent abuse. Ill. Rev. Stat. ch. 110A, § 201 (c) (1967).

¹⁹ Illustrative of this problem is *In re Coddington's Will*, 307 N.Y. 181, 120 N.E.2d 777 (1954) where the history of the New York statute is traced. The dissent demonstrates the testatrix was in reality incompetent, and this could have been shown if the statute had been interpreted to allow the physician to testify.

²⁰ *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1948); 8 Wigmore, Evidence § 2391 (McNaughton rev. 1961); Annot., 97 A.L.R.2d 393 (1964).

Some courts take a different approach to this problem by finding that the physician did not treat the patient for a mental illness. And the physician-patient privilege does not apply to information which the physician acquired unless the information is necessary for treatment. 8 Wigmore, Evidence § 2384 (McNaughton rev. 1961).

²¹ The New York statute provides that the physician-patient privilege may not be waived if the testimony will bring shame to the name of the deceased. *Meyers v. Supreme Lodge K. P.*, 178 N.Y. 63, 70 N.E. 111 (1904).

by fraud or undue influence.²² The personal representative's motives are unquestioned, and it is presumed he acted to preserve the memory of the deceased.

Where medical testimony is necessary, for example, in accidental death policies to establish the decedent's cause of death or to rebut a defense of suicide, beneficiaries of insurance policies might be unable to recover in court actions if the personal representative would not or could not waive the privilege.²³ This presents a particularly anomalous situation. The deceased expressed his intention to give a beneficiary a sum of money, and the courts say the beneficiary is not to have the physician's testimony to obtain his intended gift. In Illinois, the physician-patient privilege should not be troublesome where the patient is either dead or disabled. In such a case an exhaustive list of persons, which includes the beneficiary of an insurance policy, are allowed to waive the privilege. A physician is also allowed to testify in all suits brought by or against the personal representative or the beneficiary where the decedent's physical or mental condition is an issue. Moreover, the statute further provides that a physician may testify anytime the validity of a document, such as a will, is at issue.²⁴

The physician-patient privilege is for the benefit of the patient and the Illinois statute says this privilege may be waived by the express consent of the patient. The statute does not define express consent.²⁵ If the prior discussion is correct, that the patient can not claim the physician-patient privilege where his physical or mental condition is made an issue in the case, it would seem that express consent is probably not necessary where the patient has an interest in the litigation, since in most cases the other exceptions would remove the protection of the statute. Express consent is still significant where the patient does not have an interest in the case and is called only as a witness or is not present in court at all.

When the patient is present only as a witness, the patient can claim the privilege to avoid personally testifying and his express consent would be necessary to obtain the physician's testimony. If the patient is not present

²² *Stayner v. Nye*, *supra* note 20; *Pence v. Meyers*, 180 Ind. 282, 101 N.E. 716 (1913) (if the personal representative does not waive the privilege, the physician cannot testify to set aside the will).

²³ Many statutes do not allow the beneficiary to waive the physician-patient privilege. See *Shuman v. Supreme Lodge Knight of Honor*, 110 Iowa 480, 81 N.W. 717 (1900); *Thompson v. National Life & Accident Co.*, 21 Ohio Op. 497, 37 N.E.2d 621 (Ohio App. 1941).

In *Scott v. Smith*, 171 Ind. 453, 85 N.E. 774 (1908), the court said, the executor could only waive the deceased's privilege to protect the interests of the estate. Therefore, even if the executor were willing to waive the privilege, in some cases it is doubtful that the executor could waive the privilege to assist a beneficiary where the proceeds do not pass through the estate.

²⁴ See Ill. Rev. Stat. ch. 51, § 5.1 subsections 3, 4, & 5, *supra* note 1.

²⁵ For possible meanings of "express waiver" see 8 Wigmore, Evidence § 2388 (McNaughton rev. 1961).

in court and has not given his express consent, the physician can refuse to testify to preserve the patient's privilege.²⁶ This inability to obtain any information concerning matters which have occurred within the physician-patient relationship has been troublesome in malpractice and abortion cases. Without the testimony of either the patient or the physician, evidence is difficult, if not impossible, to obtain in malpractice and abortion cases. In addition, unless the physician can disclose treatment he has given, how can he defend a malpractice suit?²⁷ To get around these problems the statute removes the physician-patient privilege in civil or criminal actions against the physician for malpractice and in criminal actions for abortions.²⁸

The physician-patient privilege is available only if the patient is able to establish that the status of physician-patient existed. The Illinois statute says, "No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him to professionally serve such patient."²⁹

²⁶ In *Darling v. Pacific Elec. Ry.*, 197 Cal. 702, 242 P. 703 (1925), the court said the physician was able to claim the patient's privilege. *But see* 8 Wigmore, Evidence § 2386 (McNaughton rev. 1961). Professor Wigmore says that the patient must eventually claim the privilege. This conflict is moot because usually the patient will claim the privilege.

²⁷ In civil suits for malpractice the patient could prevent the physician from defending his case by claiming the physician-patient privilege. *Aspy v. Botkins*, 160 Ind. 170, 66 N.E. 462 (1902) (the patient was able to withhold the testimony of other physicians who treated patient later); 8 Wigmore, Evidence § 2385 n.3 (McNaughton rev. 1961); *Havener, Malpractice Medical Discovery v. Physician-Patient Privilege—Something's Got to Give!*, 35 Ins. Co. J. 41 (1968). For the criminal problems in malpractice suits see 8 Wigmore, Evidence § 2385 (McNaughton rev. 1961).

²⁸ See Ill. Rev. Stat. ch. 51, § 5.1 subsections 1, 2 & 6 (1967), *supra* note 1.

²⁹ *Miller v. Miller*, 47 Ind. App. 239, 94 N.E. 243 (1911) (the physician was allowed to testify regarding casual portions of conversations in which the deceased promised to pay his daughter for services); *Kirkpatrick v. Milks*, 257 Wis. 549, 44 N.W.2d 574 (1950) (where the doctor was a witness to the execution of a note the court said he was not present to render services); *Frederick v. Federal Life Ins. Co.*, 13 Cal. App. 2d 585, 57 P.2d 235 (1936) (statements taken by interns for admission records are not privileged because they are not necessary to prescribe or act for the patient). *Contra*, *People v. Decina*, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799 (1956) (prior history is necessary for treatment and division of duties does not defeat the privilege).

Examination made for purposes of obtaining insurance, to obtain evidence or examinations made by doctors to give expert testimony at trials are not excluded by the physician-patient privilege because the information obtained is not to help serve the patient professionally. Ill. Rev. Stat. ch. 110A, § 215 et. seq. (1967) (describes the statutory procedure for compelling physical examinations for use at trial); *Edington v. Mutual Life Insurance Co.*, 67 N.Y. 185 (1876) (information obtained during a physical examination to obtain insurance was not privileged); *McGinty v. Brotherhood of Ry. Trainmen*, 166 Wis. 83, 164 N.W. 249 (1919). In *City of Racine v. Woiteshek*, 251 Wis. 404, 29 N.W.2d 752 (1947), the physician took a blood sample to determine alcohol content. There was no privilege because the physician was acting to obtain evidence not to serve the patient. *See Annot.*, 107 A.L.R. 1495 (1937).

The requirement that information be obtained to enable the physician to professionally serve does have one exception. Information which is obtained for medical research is not obtained to professionally serve the patient but is obtained for scientific purposes. Research information is made confidential in Ill. Rev. Stat. ch. 51, §§ 101 & 102 (1967). All information which is gathered becomes confidential except "the original medical records pertaining to the patient. . . ." Unlike section 5.1, this section gives unqualified

The statute gives the privilege to the relationship which exists between a physician or surgeon and a patient. The words "physician or surgeon" are generally given a narrow interpretation and some doubt exists if an intern is within the definition.³⁰

The statute further requires that the information be obtained while the physician is acting in his professional capacity. The mere presence of a physician and an injured person, even though the physician renders assistance, is not sufficient to establish the physician-patient relationship.³¹ Neither is payment nor lack of payment the determining factor.³² Usually it is the conduct of the physician as he renders treatment that determines if the status exists. Would a physician behave in a particular manner if he were not acting in his professional capacity? For this reason the physician-patient status has been found to exist even where the patient resists treatment or is unconscious.³³

It is interesting to note that the statute does not require confidential protection to medical information. If original medical records were not excluded from sections 101 and 102 the patient could avoid the exceptions to section 5.1 by turning his medical records over to a research organization. See Gard, Illinois Evidence Manual Rule 441 (1963).

³⁰ *Rarogiewicz v. Brotherhood of American Yeomen*, 242 N.Y. 590, 152 N.E. 440 (1926) (evidence of intern excluded, but he was acting as agent of physician); *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947) (a nurse is not within the privilege even if she is acting as an agent of the physician); *Gulf M. & N. Ry. v. Willis*, 171 Miss. 732, 157 So. 899 (1934) (a dentist is not within this privilege); 8 Wigmore, Evidence § 2283 n.3 (McNaughton rev. 1961). Similar problems exist for chiropractors, osteopaths and christian science practitioners, but would the latter be able to claim the priest-penitent privilege? See Annot., 47 A.L.R.2d 742 (1956).

³¹ In *Griffiths v. Metropolitan St. Ry.*, 171 N.Y. 106, 63 N.E. 808 (1902), the plaintiff was injured by a cable car and was taken to a nearby drug store where he was given first aid treatment by a physician. The physician also rode part way to the hospital in the ambulance. The court found the physician was only rendering temporary assistance and no physician-patient relationship was established.

³² *Pennsylvania R.R. v. Hough*, 88 Ind. App. 601, 161 N.E. 705 (1928) (doctor of employer cannot testify about an employee where the relationship of physician-patient exists); *Louisville, etc. Traction Co. v. Snead*, 49 Ind. App. 16, 93 N.E. 177 (1910) (appellant sent doctor to attend those injured in an accident); *Bauch v. Schultz*, 109 Misc. 548, 180 N.Y.S. 188 (Sup. Ct. 1919) (it is immaterial that patient did not pay for services); *Casson v. Schoenfeld*, 166 Wis. 401, 166 N.W. 23 (1918) (doctor of state institution could not testify regarding patients sanity because treatment and care is part of the institution duties).

³³ *North American Union v. Oleske*, 64 Ind. App. 435, 116 N.E. 68 (1917) (the patient was unconscious). *Meyer v. Supreme Lodge K. P.*, 178 N.Y. 63, 70 N.E. 111 (1904) (patient trying to commit suicide resisted treatment and was uncooperative). In *Adler v. State*, 239 Ind. 68, 154 N.E.2d 716 (1958), a physician took a blood sample to determine blood type for a transfusion of an unconscious accident victim. Part of the sample drawn was later used to run an alcohol test for a later drunk driving prosecution. This information was held inadmissible because the doctor was acting as a physician when he took the blood sample and it was necessary to professionally serve the patient.

There is no doubt that if a separate blood sample had been drawn by another physician the evidence would have been admissible by the rule in *Schmerber v. State of California*, 384 U.S. 757, 86 S. Ct. 1826 (1966). See *People v. Downs*, 5 App. Div. 2d 935, 172 N.Y.S.2d 377 (Sup. Ct. 1958) and *City of Racine v. Woiteshek*, 251 Wis. 404, 29 N.W.2d 752 (1947).

information. Any information which he may acquire in attending the patient in a professional character is within the physician-patient privilege. This language is broad enough to include information obtained through observation, examination, x-rays, tests or conversation. The purpose of the statute is to protect information. For this reason physician's records and reports are also privileged in order to prevent the indirect disclosure of information which the statute seeks to protect.³⁴

However, information acquired is not privileged unless two other qualifications are met. The statute requires that (1) information be acquired while the physician is attending the patient and (2) the information must be "necessary to enable him to professionally serve such patient"³⁵ These requirements will make the status of physician-patient more difficult to establish. By comparison, the Indiana statute only requires that information be obtained by physicians "in the course of their professional business."³⁶ In the case of *Chicago, etc. Ry. v. Walas*,³⁷ a physician observed a patient in an emergency room vomiting and formed the opinion the patient was drunk. The information was learned before the physician was assigned to the patient. The court said the information was gained by a person who was engaged in the duties of a physician and the information was privileged. The information was neither obtained while the physician was attending the patient nor was the information necessary to professionally serve the patient.

One troublesome area of the physician-patient privilege has not been mentioned and there is no Illinois case on this point. The statute is silent on what effect the presence of third parties has on the privilege. It is probably without question that third parties who are not necessary for treatment may testify as to what they heard or saw,³⁸ but it is usually the expert testimony of the physician which is sought. It is the effect that the presence of third parties has on the physician-patient relationship that is important.

³⁴ The same conclusion is reached in *In re Coddington's Will*, 307 N.Y. 181, 120 N.E.2d 777 (1954), where the court interpreted an early New York statute with wording similar to the wording of the Illinois statute. See Annot., 120 A.L.R. 1124 (1939); Annot., 75 A.L.R. 378 (1931); 8 Wigmore, Evidence § 2384 (McNaughton rev. 1961). But see *Leusink v. O'Donnell*, 255 Wis. 627, 39 N.W.2d 675 (1949) (physician's reports but not x-rays are within the protection of the statute).

³⁵ 8 Wigmore, Evidence § 2283 (McNaughton rev. 1961).

³⁶ Burns' Ind. Stat. § 2-1714 (1964 Replacement).

³⁷ 192 Ind. 369, 135 N.E. 150 (1922).

³⁸ *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co. of Philadelphia*, 2 F. Supp. 203 (N.D. Cal. 1933) (court indicates wife could be compelled to testify about treatment given to her husband); *Springer v. Byram*, 137 Ind. 15, 36 N.E. 361 (1893); 8 Wigmore, Evidence § 2381 n.3 (McNaughton rev. 1961).

Compare the wording in Ill. Rev. Stat. ch. 51, § 5.2 (1967) which provides enumerated instances where third parties can be prevented "from disclosing, communications relating to diagnosis or treatment of the patient's mental condition. . . ."

Generally, if the third party is present and necessary for treatment, the physician-patient privilege is extended to the third party also.³⁹ But where third parties who are not necessary for treatment are present, the entire privilege may be destroyed.⁴⁰ The physician-patient privilege was conceived to allow intimate disclosures without fear of future publication. It is a privilege to promote confidence. Where groups of people are present, courts have held the privilege never existed because the patient never intended the conversation to be confidential.⁴¹

There are only a few cases which tend to show when, and how, the Illinois statute is to be applied. When deciding future cases, the courts will not be unduly limited by prior decisions. In other states, the current trend in regard to the physician-patient privilege has been one of general disfavor.⁴² This general attitude should be considered before a claim of physician-patient privilege is pursued with any vigor. This attitude, if adopted by the Illinois courts, would have special significance because the Illinois statute lends itself to a construction which could make the physician-patient privilege an illusion in civil cases.⁴³

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³⁹ *North American Union v. Oleske*, 64 Ind. App. 435, 116 N.E. 68 (1917); *Meyer v. Supreme Lodge K. P.*, 178 N.Y. 63, 70 N.E. 111 (Ct. App. 1904); *People v. Decina*, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799 (1956).

⁴⁰ *Murphy v. Board of Police Comm'rs*, 2 Cal. App. 468, 83 P. 577 (1905). Although the court never answered the question directly, it indicated that the doctor could be compelled to testify as to disclosures made at one visit where the wife was present with the husband. Compare a later case, applying California law, *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co. of Philadelphia*, *supra* note 38, where the court indicated the privilege was not destroyed, but third parties could be compelled to testify.

⁴¹ *Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281 (1928) (three people present during house call); *Baker v. Whittaker*, 133 Ind. App. 347, 182 N.E.2d 442 (1962) (seven present during house call, the doctor was a friend, and one purpose of the call was to determine if she was competent to convey land).

⁴² *Masonic Mut. Ben. Assn. v. Beck*, 77 Ind. 203, 210 (1881), "It (the statute) was intended to remove from the law a reproach which had been long felt and often expressed by judges, and it should be interpreted and enforced in a liberal spirit, with a view to effectuate its purpose."

Compare a later Indiana case *Stanyer v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1948), where the court said statutes in derogation of the common law will be strictly construed where they interfere with the ascertainment of the truth. In *Leusink v. O'Donnell*, 255 Wis. 627, 632, 39 N.W.2d 675 (1949), the court expressed its feelings for the statute when it said, "The reason of the rule of the statute, as far as it has any. . . ." *But see Howard v. Porter*, 240 Iowa 153, 35 N.W.2d 837 (1949), where the court says a liberal construction should be given to the statute to carry out its manifest purpose.

⁴³ *Gard*, Illinois Evidence Manual Rule 441 (1963). Judge Gard believes the statutory exceptions are so comprehensive that very little of the privilege is left.